

UNITED STATES BANKRUPTCY COURT

DISTRICT OF HAWAII

In re)	Case No. 97-03746
)	Chapter 11
UPLAND PARTNERS, a Hawaii)	
limited partnership,)	Re: Docket No. 3035, 3086
)	
Debtor.)	
_____)	

**AMENDED FINDINGS OF FACT AND
CONCLUSIONS OF LAW REGARDING ALLOWANCE
OF COMPENSATION TO TRUSTEE'S SPECIAL COUNSEL**

The court having reviewed the Second and Final Application for Compensation and Reimbursement of Expenses, filed on September 29, 2004 (docket no. 3035) by Kessner Duca Umebayashi Bain & Matsunaga ("Kessner Duca"), and the relevant parts of the record, the court makes the following

FINDINGS OF FACT

1. Kessner Duca represented the trustee as special counsel in an appeal taken by William S. Ellis, Jr. By order entered on January 23, 2004 (the "First Fee Order"), the court allowed compensation and reimbursement to Kessner Duca in the amount of \$11,622.04. After this court denied Mr. Ellis' motion to vacate the First Fee Order, Mr. Ellis appealed. Kessner Duca defended its compensation in the appeal. The district court affirmed the First Fee Order.

2. Kessner Duca then applied for compensation and reimbursement for the period from February 25 through September 20, 2004 (the “Second Fee Application”). This period includes the work done on Mr. Ellis’ appeal of the First Fee Order to the district court.

3. All of the services described in the Second Fee Application were actually rendered and all of the expenses for which Kessner Duca seeks reimbursement were actually incurred. Mr. Ellis does not contend otherwise.

4. All of the services rendered and expenses incurred by Kessner Duca were necessary and were beneficial at the time to the completion of the case. There is no merit to Mr. Ellis’ contentions that some of the work was unnecessary. All of the tasks performed would have been performed by any prudent, competent attorney. Any such attorney would have (among other things) sought dismissal of the appeal based on the absence of an opening brief, reviewed papers served on him by the clerk of the court (even if the clerk erroneously served papers on Kessner Duca related to another one of Mr. Ellis’ many appeals in which Kessner Duca was not involved), and included the counter-statements contained in Kessner Duca’s answering brief. The fact that the district court did not adopt some of Kessner Duca’s arguments does not detract from the fact that it was reasonable and necessary for Kessner Duca to make those arguments.

5. The time that Kessner Duca spent on the services is reasonable and commensurate with the complexity, importance, and nature of the problem, issue, or task addressed. The time spent on the appeal was modest and entirely reasonable.

6. The rates charged by Kessner Duca for the services are reasonable and comparable to the rates charged by other attorneys with comparable levels of skill and experience. In particular, Mr. Duca is one of the most accomplished, experienced, and skillful practitioners in this district. His hourly rate is eminently reasonable.

7. The compensation that Kessner Duca requests is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

8. There was no unnecessary duplication of services.

9. The services rendered are within the scope of the employment.

10. The Findings of Fact and Conclusions of Law Regarding Payment of Fees and Expenses to Trustee and His Counsel Under 11 U.S.C. § 506(c), entered on February 11, 2003 (docket no.2395), are incorporated herein by this reference.

Based on the foregoing findings of fact, the court makes the following:

CONCLUSIONS OF LAW

1. The fees and costs requested by the Second Fee Application are authorized by law. Their award is necessary to further the purpose of Section 330 of the Bankruptcy Code to assure that professionals working in bankruptcy cases are compensated at the same rate as professionals providing comparable services in other areas of the law, and to prevent bankruptcy professionals from having their compensation diluted by a failure to compensate them for time spent in the application for and defense of fee awards in bankruptcy.

2. This case is an object lesson in why professionals must be allowed reasonable compensation for time spent defending their compensation awards on appeal. Outside of bankruptcy, professionals ordinarily do not have to seek court approval of their compensation, and parties do not face the risk that their adversaries could affect their ability to participate in the litigation by challenging their professionals' compensation. The Bankruptcy Code's compensation approval requirements create an inherent and unavoidable danger that a trustee's adversaries could, as part of a "scorched earth" litigation strategy, attempt to deprive the

trustee of competent, zealous, and attentive representation by objecting to and appealing from compensation awards.

3. Mr. Ellis is an archetype of the “scorched earth” litigant. He has managed to turn a relatively straightforward single asset real estate case into a seven year ordeal which has consumed hundreds of thousands of dollars of professional expense. He has appealed from most of the orders entered by this court in the last few years, including many orders allowing compensation to the Trustee’s professionals. Trustees and professionals would be reluctant to get involved in a case with a litigant like Mr. Ellis under any circumstances. They would be even more reluctant unless they were entitled to payment for all of their time which the bankruptcy process requires them to spend, not only in performing their professional duties, but also in getting paid for that work, including time reasonably spent defending appeals from orders approving their compensation.

4. The objections of Mr. Ellis to the Second Fee application have no legal merit or factual support.

5. The amounts requested in the Second Fee Application should be allowed in full on an interim basis.

A separate order shall be entered denying the motion.

DATED: Honolulu, Hawaii, January 13, 2005.



/s/ Robert J. Faris

United States Bankruptcy Judge